

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**NINO MARTINENKO, on behalf of herself  
and others similarly situated,**

**CASE NO. 22 CV 518**

**Plaintiff,**

**v.**

**212 STEAKHOUSE, INC., and NIKOLAY  
VOLPER,**

**Defendants.**

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**DECLARATION OF MICHAEL DIGIULIO**

Michael DiGiulio declares under penalty of perjury pursuant to 28 U.S.C. § 1745 that:

1. I submit this declaration in support of Plaintiffs' Reply Memorandum of Law in Reply in support of Plaintiffs' Motion for Summary Judgment.
2. I am an attorney with Joseph & Kirschenbaum LLP ("JK"), class counsel in this action.
3. I am familiar with the facts and circumstances set forth herein.
4. Defendants did not produce the document attached as Exhibit 3 part c to the December 20, 2023 Declaration of Defendant Nikolay Volper (Dkt. No. 119-7) to Plaintiffs during discovery in this litigation.
5. Defendants never provided Plaintiffs with evidentiary or witness disclosures under Federal Rule of Civil Procedure 26(a)
6. Defendants produced Plaintiffs' time records in discovery, and in May 2023, pursuant to the Court's Order to produce all Class Members' time records, Defendants produced time records for additional employees, including Adrian Pizarro.
7. On June 5, 2023, Defendants produced a Class List to Class Counsel,

which included the name and contact information for Adrian Pizarro.

8. In a June 5, 2023 email, a true and correct copy of which is attached hereto as **Exhibit A**, Defendants identified four individuals whose time records Defendants had previously produced, but who Defendants claimed did not work in a covered position (because they worked in back of house or in another non-tipped positions) and who Defendants therefore did not include in the Class List. However, Defendants did not include Adrian Pizarro in this list of individuals and explicitly included him on the Class List.

9. Plaintiffs distributed the class notice to Class Members' last known addresses as provided by Defendants or located by Class Counsel, including Adrian Pizarro. Pizarro did not opt-out of the Class.

10. On September 12, 2023, after the notice period ended, Defendants, for the first time, emailed Class Counsel and took the position that Pizarro was a back of house employee and not a Class Member.

11. Defendants produced time records for Adrian Pizarro but did not provide any documentary evidence – such as a wage notice, wage statement, or any communications – to Class Counsel showing that Pizarro was not employed in a covered position and that he should not be included in the Class.

Dated: New York, New York  
January 12, 2024

JOSEPH & KIRSCHENBAUM LLP

By: /s/ Michael DiGiulio  
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*Attorneys for Plaintiffs and Class*